Nos. 648 and 635 Misc.

# In the Supreme Court of the United States

OCTOBER TERM, 1960

JOSEPH PAUL LO PICCOLO, PETITIONER

*v.*

UNITED STATES OF AMERICA

JAMES SANTORE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON SUPPLEMENTAL PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION


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### OPINIONS BELOW

Neither the original opinion of the court of appeals nor its opinion on rehearing *in banc* is yet reported.

### JURISDICTION

The judgment of the court of appeals *in banc* was entered on November 16, 1960. The supplemental petition of James Santore for a writ of certiorari was filed on December 17, 1960. On December 16, 1960, Mr. Justice Harlan extended the time for filing a sup-

plemental petition for writ of certiorari on behalf of Joseph Paul Lo Piccolo to and including January 14, 1961. The supplemental petition of Joseph Paul Lo Piccolo for a writ of certiorari was filed on January 13, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the judgment of the court of appeals *in banc*, reinstating petitioners' convictions on count 2 (as to which concurrent sentences were imposed), furnishes sufficient additional reason for the Court to consider this case.

## STATUTES INVOLVED

18 U.S.C. 2 provides as follows:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 U.S.C. 174 provides as follows:

> Whoever fradulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States

contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

* * * * *

STATEMENT

1. From the original judgment of the court of appeals, five petitions for certiorari were filed which are still pending before this Court, Nos. 15, 16, 17, 5 Misc., and 6 Misc., this Term. The two petitions that have now been filed by Lo Piccolo (No. 648) and Santore (No. 635 Misc.) seek review of the modifications to its original judgment made by the court of appeals on rehearing *in banc*, and are supplemental to the original petitions filed by those two defendants (Nos. 17 and 5 Misc., respectively). The circumstances giving rise to the supplemental petitions are as follows:

The indictment, naming the five petitioners and other defendants, charged, in counts 1–4, substantive narcotics offenses and, in count 5, a conspiracy. The district court, sitting without a jury, found all de-

fendants guilty as charged. Lo Piccolo was convicted on counts 2 and 5 and was given concurrent sentences of twenty years on each of the two counts. Santore was convicted on counts 1, 2, 3, and 5 and was given concurrent sentences of twenty years on each of the four counts. The original judgment of the court of appeals, entered by a three-judge panel, reversed their convictions on count 2 but affirmed on the other counts. To review the judgment of affirmance on the other counts, Lo Piccolo and Santore filed their original petitions for certiorari (Nos. 17 and 5 Misc.).

Primarily because of the complete reversals of the convictions of two other defendants, Narducci and Tarlentino, the government petitioned for a rehearing *in banc* by the court of appeals, which was subsequently granted. On the rehearing, the court of appeals adhered to the reversals of the convictions of Narducci and Tarlentino, and the government has not petitioned for certiorari from that part of the decision. The court did, however, reverse itself as to Lo Piccolo and Santore on count 2 and reinstated their convictions on that count (a decision which, since the sentences on the several counts were concurrent, did not affect their total sentences). It is to bring up for review their now-affirmed convictions on that additional count that Lo Piccolo and Santore have filed their supplemental petitions.

2. The facts are set forth in the government's consolidated brief in opposition in Nos. 15, 16, 17, 5 Misc., and 6 Misc. Those directly relevant to count 2 (the sale of a half kilo of heroin on December 11, 1957), to which the present petitions are directed,

may be found at pp. 8–9 of that brief. Since the petitions will presumably be considered and disposed of together, they will not be repeated here.

3. In the original majority opinion, written by Judge Waterman, it was held that the term "possession", as used in 18 U.S.C. 174, "includes not only immediate physical control but also that control which is exercised through agents". On a finding that Santore had not exercised any proprietary control over the drugs in count 2, he was held not to have had possession.[1] Lo Piccolo, it was held, did not exercise control over the transaction. Judge Hand (in dissenting as to defendants D'Aria and Massi) expressed the view that, in order to invoke the statutory presumption, the narcotics should be either in the actual custody of an accused or unconditionally subject to his demand for custody. Judge Byers (who favored affirmance of the conviction of all defendants) was of the opinion that the partnership relation should be determinative, rather than Judge Hand's test of a right at any particular time to demand custody. The discussion in the opinions of the original panel was thus on the proof necessary to show "possession," a matter discussed in the government's brief in opposition heretofore filed.

When the court of appeals reconsidered the case *in banc*, the participating judges—the six active circuit judges, which included of the original panel only

[1] No mention was made of Santore's actual knowledge of illegal importation, based on his presence at the preliminary meeting when Casella referred to his merchandise as being "just as it comes off the boat."

Judge Waterman—were unanimously of the view that dominion and control constitute possession as much as manual custody of narcotics, citing in addition to cases already considered the recent cases of *United States* v. *Cox*, 277 F. 2d 302 (C.A. 2) and *Cellino* v. *United States*, 276 F. 2d 941 (C.A. 9). On that basis, the principal opinion, written by Judge Lumbard, held that the evidence showed supervisory control by Lo Piccolo over the narcotics involved in count 2 and hence sufficient possession to give rise to the presumption of illegal transportation. As to Santore, it was held, four of the six judges concurring, that Santore had actual knowledge of illegal importation by reason of hearing the assertion by Casella that the quality of his merchandise was "just as it comes off the boat". Judge Lumbard also went further in his opinion and made the principal ground for upholding Santore's conviction his role as an aider and abettor (18 U.S.C. 2) in the transaction. On this point the court was equally divided.

## ARGUMENT

1. The supplemental petition of James Santore is out of time, having been filed more than thirty days after the judgment of the court of appeals was entered.

2. The issue on which there was an equal division in the court of appeals—whether one shown to be an aider and abettor of a person possessing narcotics may be held to knowledge of illegal importation and convicted under 21 U.S.C. 174 without proof of personal knowledge or personal possession—is not really present in the case.

a. Even as to the reinstated count 2, it is not necessary to reach the question of the applicability of the aiding and abetting statute (18 U.S.C. 2) to the conviction of Santore and Lo Piccolo, although that question was of significance as to the two defendants now out of the case, Narducci and Tarlentino. As four members of the court point out, and none deny, Santore was present at the preliminary meeting, which he himself had arranged between Casella and the two agents, when Casella said he could supply heroin in unlimited quantities, "with the quality just as it comes off the boat" (II R. 15–16, 32). This broad assertion was not limited to any particular transaction, but was Casella's statement of his capability to supply any demand by the two men he supposed were illicit dealers. The phrase "as it comes off the boat" is subject to no other interpretation than that the narcotics were imported, which importation for any purpose is prohibited by statute. Since there was direct and actual knowledge of illegal importation, it was unnecessary to invoke the statutory presumption.

As to Lo Piccolo, the evidence discussed in detail in the government's prior brief and in the opinion of Judge Lumbard below shows that he was the principal conspirator, with supervisory control over the transaction described in count 2. He was the supplier of the heroin which was delivered to the Hotel Edison on the evening of December 11, 1957. Judge Friendly (who did not believe that the aiding and abetting statute applied to proof of knowledge of illegal importation) agreed that the proof showed that

the heroin delivered by Orlando had been in Lo Piccolo's possession and that Orlando transported the heroin on Lo Piccolo's instructions, so that Orlando's possession was Lo Piccolo's.

b. Moreover the reinstatement of the convictions of the two petitioners herein on count 2 has no effect on their total sentences of twenty years each, as the sentences on all counts were made concurrent. All the judges of the court below who have passed on the case have always been in agreement that the conspiracy count against these petitioners was amply proved. For the reasons discussed in our prior brief in opposition, this conclusion is clearly correct and petitioner's attack thereon raises no question warranting review.[2]

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[2] If the issue of the significance of the aiding and abetting statute should be reached, the government would take the position that the aiding and abetting statute may properly be considered in prosecutions under 21 U.S.C. 174, as it applies by its terms to all offenses against the United States. Moreover, we agree with the views expressed by Judge Smith that where possession by one of co-conspirators is a necessary part of the common scheme, the possession by one is the possession of all the partners.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the supplemental petitions for certiorari should be denied.

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